June 18, 1999

In the Matter of:	*	
	*	
Rock A. Roberts	*	
Claimant	*	
	*	
v.	*	
	*	Case No. 1998-LHC-2882
Ham Marine, Inc.	*	
Employer	*	OWCP No. 7-145362
	*	
and	*	
	*	
Ins. Co. of the State of PA/	*	
AIG Claim Services	*	
Carrier	*	

APPEARANCES:

David C. Frazier, Esq.
For the Claimant

Michael J. McElhaney, Jr., Esq.
For the Employer/Carrier

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - DENYING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on April 23, 1999 in Gulfport, Mississippi, at which time all parties were given the opportunity to present evidence and oral arguments. Post-hearing briefs were not requested herein. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and RX for an exhibit offered by the Employer/Carrier ("Respondents" herein). This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as:

Exhibit No.	Item	Filing Date
RX 16	Attorney McElhaney's letter filing deposition notices relating to the following individuals 1. Lee Davis 2. Paul Hennis 3. Ricky Parker 4. Rocky Romano 5. Percy Vaugh	05/07/99
RX 17	Attorney McElhaney's letter	05/20/99
RX 18	filing a notice relating to the rescheduling of the deposition of Ricky Parker	
RX 19	Attorney McElhaney's letter filing the May 13, 1999 Deposition Testimony of	06/07/99
RX 20	R. C. "Rocky" Romano	06/07/99
RX 21	Lee Davis	06/07/99
RX 22	Paul Hennis, as well as the	06/07/99
RX 23	Exhibits to the Depositions of Mr. Davis, Mr. Hennis and Mr. Romano	06/07/99
RX 24	Attorney McElhaney's letter filing the	06/07/99

RX 25	May 20, 1999 Deposition Testimony of Ricky D. Parker, as well as the	06/07/99
RX 26	Exhibits to the Deposition of Mr. Parker	06/07/99

The record was closed on June 7, 1999 as no further documents were filed.

Stipulations and Issues

The parties stipulate (JX 1), and I find:

1. The Act applies to this proceeding.

2. Claimant alleges that he suffered an injury on May 30, 1997 in the course and scope of his maritime employment.

3. The Employer filed a notice of controversion on or about September 10, 1997.

4. The parties waived the informal conference.

5. The applicable average weekly wage is $600.70.

6. The Employer and its Carrier have paid no benefits herein.

7. Maximum Medical Improvement took place on February 11, 1998.

The unresolved issues in this proceeding are:

1. Whether Claimant’s cervical and lumbar problems are causally related to his maritime employment.

2. If so, whether he gave timely notice thereof and timely filed for benefits.

3. The nature and extent of his disability.

4. Claimant's entitlement to interest and penalties on any overdue compensation and his attorney's entitlement to a fee award herein.

5. Claimant's work restrictions relative to his cervical and lumbar problems.

Summary of the Evidence

Rock A. Roberts ("Claimant" herein), thirty-eight (38) years of age, with a high school education and a half semester at a junior college, as well as welding and pipefitting vocational courses, and an employment history of manual labor, began working in February of 1997 as a structural ship fitter and tack welder at the Pascagoula, Mississippi shipyard of Ham Marine, Inc. ("Employer"), a maritime facility adjacent to the navigable waters of the West Pascagoula River and the Gulf of Mexico where the Employer builds and repairs vessels. (TR 15-17)

On May 30, 1997 Claimant was directed by a supervisor to move by himself some large pieces of pipe as there was no crane or rigger or chainfalls or so-called "comealongs" to help him. Claimant asked his foreman, Paul Enos, for help and he replied that Claimant was directed to move that pipe and he (Mr. Enos) did not care how the pipe was moved. This occurred after lunch, between 1 PM and 2 PM, and, as he was in the process of moving that pipe, he injured his neck and back and he experienced the onset of lumbar and cervical pain, Claimant describing the symptoms as if someone hit him in the back of his neck with a baseball bat. He then experienced numbness and tingling radiating down both legs and he sat down to rest for a few minutes. He continued to work although experiencing pain. Russell McCullough came up to Claimant and told Claimant that he should go to First Aid. Claimant did not go there right away and he and Mr. McCullough finished that job. (TR 17-22)

At the end of the day Claimant went to see Paul Hennis and told him what had happened to his cervical and lumbar areas after moving that heavy pipe. According to Claimant, Mr. Hennis called Claimant several unflattering names such as a "wimp" and a (deleted).[1] When Mr. Hennis asked Claimant if he wanted to go to First Aid, Claimant declined and Mr. Hennis walked away. Claimant worked the next scheduled work day although still experiencing numbness, tingling and pain in his neck, shoulders and back. The symptoms continued and Claimant went to see Gary Brown, D.C., (or Gary Brannon, D.C. (TR 25)) for chiropractic evaluation and manipulation and the doctor then sent Claimant to see Richard

[1]A demeaning and slang reference to female genitalia.

Bennett, D.O., for further evaluation. Claimant's x-rays showed degenerative disc problems. Claimant who was also referred to Dr. John J. McCloskey, a neurosurgeon, for a second opinion, and Claimant gave all of his doctors' disability slips to the Employer's representatives. As the employer has consistently refused to accept Claimant's injury as compensable, Claimant has been forced to seek medical treatment through his group hospital carrier. Moreover, Dr. Bennett sent his medical bills to the Employer but the Employer has consistently refused to pay them. (TR 22-29)

Although Mr. Hennis told Claimant that he would be fired if he missed one more day of work, Claimant remarking that that was the typical attitude of Mr. Hennis and George Gentry, and while Claimant realized that Mr. Hennis "was serious," the symptoms were severe enough that he still went to see Dr. McCloskey. Claimant again gave that doctor's slip to Mr. Hennis who, upon receiving the slip, started shaking his head and spouted "You are fired. I don't want that paper" and "there is nothing wrong with you." According to Claimant, Lee Davis came up to both of them and said to Mr. Hennis: "You can't do that." Mr. Hennis replied, "I can do anything I want to do," because "I'm a general foreman" and then he asked Lee Davis, "What's your problem?" Mr. Hennis then stated, "I can do whatever I want to do." Lee Davis again reminded Mr. Hennis, "You can't do that." Mr. Hennis then apparently got the message and replied, "No, Rock, you are not fired but I don't what you to work today" because "actually I fired you on Monday for that poor fit you did" on the job. Claimant protested that allegation of poor workmanship with these words: "No, I did a good fit" and "you approved that fit." Claimant testified that the reason for the termination was completely "false" and Lee Davis crossed Claimant's name off the list of employees and he told Claimant to go home. (TR 29-39)

Claimant was unemployed from July 9, 1997 to August 6, 1998 because he was unable to find work within his restrictions. He worked at Universal Ensco, Inc. from August 16, 1998 (?) to January 15, 1999 as a utility inspector supervising a crew of workers cleaning out timbers on road rights of way. He is now in-between jobs and is looking for work. (TR 39-42)

Claimant's medical records reflect that he went to see Richard Bennett, D.O., on May 29, 1997 or June 2, 1997 for evaluation and treatment of upper and lower back pain and the doctor's notes, in evidence as CX 6, are, for the most part, illegible. Claimant also saw Dr. Bennett on June 11, 1997, July 8, 1997, July 14, 1997, August 7, 1997 and August 20, 1997, at which time Claimant was referred to Dr. McCloskey. (CX 6 at 5)

Claimant's July 29, 1997 MRIs of the cervical and lumbar spines were read as follows by Dr. Roland Mestayer (CX 6 at 6):

"MRI OF THE CERVICAL SPINE ON 7/29/97:

Utilizing a standard imaging protocol, an MR examination of the cervical spine is performed. Straightening and reversal of the normal cervical lordosis is documented. The alignment of the cervical segments is normal. A focal protrusion of the C5-6 disc centrally and into the right lateral recess is demonstrated. A moderate focal spinal stenosis is produced. A small protrusion at C3-4 producing minimal central spinal stenosis is documented. At C6-7, a similar small central protrusion is noted. No other abnormalities are apparent. The craniocervical junction is normal.

"IMPRESSION: MODERATE SPINAL STENOSIS AT C5-6 RELATED TO A CENTRAL AND RIGHT-SIDED DISC PROTRUSION IS SEEN.

"MRI OF THE LUMBAR SPINE ON 7/29/97:

Utilizing a standard imaging protocol, an MR examination of the lumbar spine is performed.

The alignment of the lumbar vertebral bodies is normal. Diffuse annular bulges at L3-4 and L4-5 are detected. Minimal spinal stenosis is produced. No root compromise is demonstrated.

Abnormal signal within the right posterior elements of L5 is suggested. This may represent unilateral right spondylolysis but plain films are recommended.

"IMPRESSION:
1. MILD ANNULAR BULGES AT L4-5 AND L3-4 ARE SEEN BUT PRODUCE MINIMAL SPINAL STENOSIS.

2. POSSIBLE RIGHT UNILATERAL SPONDYLOLYSIS OF L5."

Dr. Paul H. Moore reported that Claimant's additional tests on September 19, 1997 showed the following (**Id.**):

"CT OF THE LOWER FOUR CERVICAL SPACES FOLLOWING MYELOGRAPHY ON 9/19/97:

The C3-4 level reveals minimal spurring posteriorly, however, there is a broad band of contrast material circumferentially about the cord. The C4-5 level also reveals a broad band of contrast material circumferentially about the cord. The C5-7 level reveals

some thinning of the Omnipaque column anteriorly with slight suggestion of radiolucency on the left side. Spurring is also noted and this is slightly more severe caudad to the C5-6 level. The C6-7 level reveals thinning of the Omnipaque column anteriorly with large spurs somewhat caudad bilaterally. This is consistent with a soft disc as well.

"IMPRESSION: MINIMAL NARROWING AND SUGGESTION OF A DISC C5-6 LEVEL RIGHT SIDE. THERE IS SOME DECREASE IN SPINAL CANAL IN THE AP DIAMETER AT THIS AREA. The C6-7 LEVEL ALSO REVEALS SLIGHT DECREASED DIAMETER ON THE AP PROJECTION. THERE IS THOUGHT TO BE A SOFT TISSUE DISC PROTRUSION AT THIS AREA."

Dr. McCloskey performed a Neurosurgical Evaluation on August 27, 1997 and the doctor reports as follows (CX 3 at 1-2):

"CHIEF COMPLAINT: Struggling with neck, mid and low back pain, right hip pain; numbness and tingling in arms and hands; legs feel weak; muscle spasms in back and legs.

"HISTORY OF THE PRESENT ILLNESS: This 36 year old white male reports that he began working for Ham Marine in February 1997. He was having no problems at all until he was injured while working on May 30, 1997. At that time he was lifting heavy pipe. He's been having trouble ever since. On June 02nd he saw Dr. Bennett. He tried to go back to work, but was terminated. He's been off work since July 07th. Of possible significance, he was injured in a minor auto accident several years ago. Neck x-rays were taken at Ocean Springs Hospital and it was commented that he probably had an old neck injury because there apparently were lots of degenerative changes. He says he's not aware of having had neck injury before and certainly has not had any problem since the accident several years ago. He's been to physical therapy. He's had electrical studies of his arms, which I don't have the results of. He's had MRI scans of his cervical and lumbar spine; I have both the films and the reports in the office today. In the cervical spine there are multiple level degenerative changes, most prominent at C5-6 with minor disc bulges at multiple levels and spinal stenosis at C5-6. In the lumbar area, there are only some mild degenerative changes at L4-5 and L3-4 and he may have unilateral spondylylosis at L5 ...

"IMPRESSION:
1. Post-traumatic cervical and low back syndromes.
2. Numbness and tingling in arms.
3. Extensive degenerative changes in cervical spine.

4. Chews tobacco.

“COMMENT: We’re going to get plain x-rays of his cervical and lumbar spine. We’re going to get his x-rays from Ocean Springs so that I can look at them. I’ve given him samples of Relafen.”

A copy of the report was sent to the Employer.

Two days later Dr. McCloskey reported as follows in his ACTION NOTE (CX 3 at 4):

“Please see my consultation of August 27th. In addition to the films that I saw on August 27th, I’ve now seen x-rays from the Ocean Springs Hospital. There is a cervical spine series that was done in 1994 which shows a very degenerated C5-6 disc and a mild swan neck deformity. This is virtually the same appearance, now present on x-rays recently taken by Dr. Bennett in his office, which I also saw today. I’ve ordered updated x-rays of his cervical and lumbar spine and am awaiting the opportunity to see them.”

"cc: R. Bennett, D.O.
Ham Marine
David Frazier, Attorney at Law"

Dr. McCloskey next saw Claimant on September 15, 1997 and the doctor reports as follows (CX 3 at 5):

"CHIEF COMPLAINT/REASON FOR VISIT: Continuing to struggle with neck, mid and low back pain, right hip pain, numbness and tingling in arms and hands, legs feel weak, muscle spasms in back and legs.

"HISTORY OF THE PRESENT ILLNESS: He reports that he was injured while working at Ham Marine on May 30, 1997 and that prior to that he wasn't having any problems. Since I saw him, I've seen x-rays of his cervical spine that were taken at the Ocean Springs Hospital in 1994 and he had a very degenerated C5-6 disc with swan neck deformity at that time. Since his injury on May 30th he's had MRI scans of his cervical and lumbar spine. In the cervical area there are degenerated and bulging discs at C5-6 and C6-7 and he's had plain x-rays that look much as they did back in 1994. In the lumbar area, there is apparent unilateral spondylylosis at L5, as well as some degenerative changes at L3-4 and L4-5. He's had electrical studies done, but I've yet to see the results. I've placed him on Relafen. He tells me that he's not significantly better, but would like to go back to work.

"PAST MEDICAL HISTORY: He's taking Relafen.

"PHYSICAL EXAMINATION: Blood pressure is 110/80. He's up and about. The Phalen test is slightly positive on the right side. There's no focal weakness in the arms or legs. His gait is normal.

"IMPRESSION:
1. Post-traumatic cervical, thoracic, and low back pain complaints.
2. Numbness and tingling in arms.
3. Weakness in legs.

"COMMENT/REPORT/PLAN: I thing before making any final recommendation, I'd like for him to have a complete myelogram. We're going to attempt to arrange that."

A copy of that report was also sent to the Employer.

Dr. McCloskey sent the following letter to Claimant on September 26, 1997 (CX 3 at 7):

"When I saw you on September 15th you were continuing to struggle with neck, mid and low back pain and right hip pain, numbness and tingling in your arms and hand, your legs felt weak, and you were

having muscle spasms in your back and legs. I recommended that we go ahead and do a myelogram. Your lumbar myelogram and CAT scan are unremarkable. The thoracic area shows nothing. In your neck, there are minor looking abnormalities at C5-6 and C6-7, but nothing that suggests there's any pressure on the nerves or that there's any indication that surgery might help. I'm still awaiting a report of your electrical studies. Once again, there are abnormalities in your neck and back, but I don't think there's anything surgical. I'm going to re-double my efforts to get copies of your electrical studies and then I would like to see you in follow up in the office so that we can discuss what to do next."

A copy of the letter was sent to the Employer.

Dr. McCloskey sent this letter to Claimant on October 1, 1997, with a copy to the Employer (CX 3 at 8):

"After seeing you on September 15th, I sent you a letter on September 26th and hope that you received it. In the interim now, I've received the results of your electrical studies from Dr. Bennett. Those studies show evidence both of problems with pinched nerves in your neck and low back, but once again there's nothing to suggest that surgery would be helpful. Please call the office and be sure that you have a follow up visit to see me to discuss all of this so that we can make our final plans."

Dr. McCloskey next saw Claimant on October 30, 1997 and the doctor states as follows in his report, with a copy being sent to the Employer (CX 3 at 9):

"CHIEF COMPLAINT/REASON FOR VISIT: Struggling with neck and mid and low back pain; right hip pain; numbness and tingling in arms and hands; legs feel weak.

"HISTORY OF THE PRESENT ILLNESS Mr. Roberts reports that prior to his injury at Ham Marine in May of 1997 he wasn't having any significant problems. I first saw him in August 1997 with neck and back complaints and problems with his arms and legs. Along the way his evaluation has included MRI scans of his cervical and lumbar spine, a complete myelogram, electrical studies on arms and legs, and other tests. Also available were x-rays of his cervical spine from 1994 that showed degenerated discs at C5-6 and C6-7. In the lumbar area it was apparent that he had unilateral spondylylosis at L5 and some degenerative changes in his discs at L3-4 and L4-5. His lumbar myelogram and CAT scan were unremarkable. A thoracic myelogram showed nothing. Studies of his neck at myelography showed some minor looking abnormalities at C5-6 and C6-7. None of the abnormalities demonstrated appeared to be surgical at all. His electrical studies were done by Dr. Bennett and showed evidence of

pinched nerves in his neck and low back, but again I thought there was nothing that suggested surgery. He's continued to have difficulty and would like to work, but feels as though he has permanent limitations.

"PAST MEDICAL HISTORY: He's taking Relafen.

"PHYSICAL EXAMINATION: Blood pressure is 120/80. Weight is 200 lbs. He's alert, oriented, up and about, looks perfectly well and healthy. There are no focal deficits in his arms or legs. His gait is normal.

"IMPRESSION:
1. Post-traumatic cervical, thoracic, and low back complaints.
2. Degenerative disc disease of the cervical spine and lumbar spine.

"COMMENT/REPORT/PLAN: I think that there are identifiable problems, particularly in his neck and to a lesser extent in his low back and I think that his current difficulty should be considered a permanent aggravation of his pre-existing degenerative problems. I think that he does have some permanent limitations. I'd like to refer him to Dr. Molly Holtzman so that she can evaluate the findings and decide when his maximum medical improvement date should be, what his limitations should be, and what his impairment rating should be. From my point of view, there's nothing neurosurgical going on.

Claimant was examined by Dr. Mollie Holtzman on December 4, 1997 and the doctor, in her report to Dr. McCloskey, states as follows (CX 8 at 1-2):

"HISTORY OF PRESENT ILLNESS: As you know, this is a 36 year old right handed white gentleman who was working for Ham Marine in May of 1997. The patient was a structural fitter and was moving an old pipe that was very heavy. He was lifting the pipe to push it over when he twisted and turned hearing a sound within his neck. He felt immediate dizziness and sat down to rest. The patient had persistent neck pain, but kept working for several days. The pain was worsening, so he went to see a chiropractor. He had several adjustments and felt better at first, but then had return of his pain after approximately one hour. The patient was then seen by Dr. Bennett, was given medication, and eventually an MRI was ordered. The patient was then referred for neurosurgical evaluation by Dr. John McCloskey. He was not felt to be a surgical candidate, and was referred here. The patient describes his pain as a constant 'uncomfortable' hurting pain in his neck and upper shoulders. He has felt a 'weakness' in both legs that is described as heaviness that increases throughout the day. His constant,

dull, neck pain and some low back pain causes him to be uncomfortable in all positions. He gets numbness in both legs and hands with prolonged sitting. He has weakness in both legs with walking, and heaviness in both arms with overhead work. He has difficulty with sleep, not resting. He denies any bowel or bladder dysfunction.

"PAST MEDICAL HISTORY: The patient is status post tonsillectomy and appendectomy. He has a history of sinus problems. He did have an injury to his neck in a motor vehicle accident several years ago, but has had no back or neck problems since that injury.

"MEDICATIONS: None presently. He had tried Relafen with some decreased pain.

"ALLERGIES: No known drug allergies.

"SOCIAL HISTORY: The patient is single and lives in Vancleave, Mississippi. He does not smoke or drink alcohol. He has always worked as a construction worker of some type, and is presently not on workman's compensation due to denied claim.

"ON TODAY'S PHYSICAL EXAMINATION: Blood pressure 120/80. Height 5' 11.5". The patient's weight is 210 lbs. General appearance: this is a well developed gentleman in no acute distress. He is able to sit comfortably without any exaggerated pain behaviors.

Neurologic examination: he is able to walk on his toes and heels, squat to the floor and rise without evidence of weakness...

Soft tissue examination reveals no paraspinal muscular spasm. He does have some tenderness along the midline throughout the cervical thoracic and lumbar spine.

Diagnostic studies: the patient has had a CT myelogram report dated 09/19/97 which revealed a normal lumbar myelogram with CT showing some narrowing and suggestion of C5-6 disk to the right side. Decreased spinal canal AP diameter in this area as well. The patient also has slight decreased diameter at the C6-7 level thought to be a soft disk protrusion. Notes from Dr. McCloskey revealed that electrical studies were done by Dr. Bennett and showed some radiculopathies in the neck. There is also a history of a dessicated C5 disk on earlier x-rays.

"IMPRESSION

1. Degenerative disc disease - cervical region, some chronic and some possibly newer with exacerbation following a work injury by history.

2. No evidence of lumbosacral or cervical radiculopathy on today's exam.
3. Possible ligamentous strain of the cervico, thoraco, and lumbar spine.

"RECOMMENDATIONS: Mr. Roberts has not had any physical therapy, except for modalities performed at the chiropractic offices that he has visited early out in his injury. I would like to put him into a course of therapy aimed at increasing muscular strength and endurance of the back and neck restoring normal posture, back conservation techniques, and general cardiovascular conditioning for the hope of return to work in some capacity. With his degenerative disease, he may not want to continue with such labor intensive work, but we will seen how he does at the end of this treatment. I have restarted him on Relafen 500 mg b.i.d., and he will be given Flexeril one to two tablets q.p.m. for deep sleep. He will return in three weeks for a follow up evaluation."

That follow-up examination took place on January 8, 1998 and Dr. Holtzman reports as follows (CX 8 at 3):

"INTERIM HISTORY: The patient has been in physical therapy for nine sessions. He has begun a generalized conditioning and stretching program. Patient reports that he is better, but still having neck and back pain. He states approximately 20% improvement overall. He has tried to work recently part time, but does not have to lift which he does not feel he could tolerate. He continues on the Relafen twice a day and the Flexeril was too sedating and was discontinued...

"IMPRESSION:

1. Degenerative disc disease, cervical region.
2. Possible ligamentous strain of the cervical, thoraco, and lumbar spine.

"PLAN: The patient will continue with nine to ten more sessions of physical therapy to progress his strengthening exercises. I would like them to add some increased stretches for the paraspinal musculature, strengthening for the rotators and lateral flexors and latissimus dorsi. He will continue Relafen twice a day and Flexeril 1/2 to 1 one hour before bed."

Dr. Holtzman next saw Claimant on February 11, 1998 and the doctor reports as follows in her FOLLOW-UP EVALUATION (CX 8 at 4):

"INTERIM HISTORY: The patient has completed his physical therapy program at Ocean Springs Hospital. On his discharge, he had satisfactory forward bending, satisfactory/marginal back extension, and marginal trunk rotation. Hamstring flexibility was satisfactory on the left, marginal on the right. Shoulder girdle and upper back mobility was marginal. Abdominal strength was marginal to satisfactory. He also had marginal scoring of quadriceps strength. On lifting, he had good body mechanics, but was only able to lift 45 pounds occasionally and 25 to 30 pounds frequently. Patient was given a home exercise program to work on the above problem areas, as well as therapeutic exercises he could continue in the gym and stretches for the cervical spine.

The patient reports that he is doing much better. He has tried working on several occasions. but has limited himself in all lifting and carrying activities. He is trying to look for a job that would not require manual labor. He continues to take the Relafen regularly and the Flexeril only occasionally, as it causes sedation...

"IMPRESSION:

1. Degenerative disc disease C5-6 and C6-7.
2. Chronic low back pain with degenerative disc disease L3-4, L4-5 and unilateral spondylolysis at L-5.
3. Status post ligamentous strain of the cervical, thoracal, and lumbar spine, improved.

"PLAN: The patient has significant degenerative disease in his back. He will continue to have problems, especially with the kind of work that he is familiar with. I agree with his attempt to find a less labor intensive job, as he should not be lifting o a regular basis more than 30 pound or so. He is independent in a home exercise program and needs to continue with the strengthening as recommended by the therapist for long term control of his pain. He will continue on the Relafen p.r.n. He will return on an as needed basis."

Dr. Thomas L. Brown performed certain neurological tests at the request of Dr. Bennett (CX 5 at 2) and Dr. Brown concludes as follows in his June 17, 1997 report (CX 5 at 4):

"SUMMARY:

1. At the C5 level, there is mixed echogenesity in the right medial semispinalis capitus musculature. These changes suggest myofascitis.

2. At the L4 level, there are poorly defined mild hyperechoic changes in the general region of the right erector spinae musculature. These changes suggest myofascitis.

3. The remainder of the examination is symmetric in echogenesity. There is no echo evidence intramuscular hematoma, rupture or fibrosis."

Dr. Jose A. Marquez reported that Claimant's June 10, 1997 nerve conduction studies showed the following (CX 5 at 24):

"**COMMENTS:** The left and right median distal motor and sensory latencies are prolonged. The amplitudes of the right and left median motor evoked responses are decreased.

"**IMPRESSION:** The findings are indicative of bilateral median motor and sensory neuropathies. Bilateral carpal tunnel syndrome is highly indicative of this examination. However, more proximal lesions in the peripheral nerves and especially the cervical roots should strongly be considered, which may have resulted in a double-crush syndrome involving compression of the cervical nerve roots and the distal peripheral nerves, i.e., the median nerves.

Therefore, MRI of the cervical spine is highly recommended," according to the doctor.

Dr. Marquez also reported as follows on June 10, 1997 (CX 5 at 25):

"Dermatome evoked potentials were carried out in the upper extremities. Sampling was of the left and right C6 dermatomes, thumb region - median nerve, C7 dermatome, index and middle digit region p median nerve and C8 dermatome, ring finger - ulnar nerve. Dermatome evoked potentials are used to evaluate nerve root dysfunction.

"**COMMENTS:** Both the right and left C6, C7 and C8 positive latencies are prolonged.

"**IMPRESSION:** The findings are indicative of bilateral C6, C7 and C8 radiculopathies. MRI evaluation of the cervical spine is highly recommended," according to the doctor.

Dr. Marquez also reported as follows on June 10, 1997 (CX 5 at 28):

"Dermatome evoked potentials were carried out in the lower extremities. Sampling was of the left and right L4 dermatomes, ankle region, saphenous nerve, L5 dermatome, ankle region - sural nerve. Dermatome evoked potentials are used to evaluate nerve root dysfunction.

"**COMMENTS:** Both the right and left L4, L5 and S1 positive latencies are prolonged.

"**IMPRESSION:** The findings are indicative of bilateral L4, L5 and S1 radiculopathies. MRI evaluation of the lumbosacral spine is highly recommended."

Dr. Marquez also reported that Claimant's somatosensory evoked potentials of the upper extremities" and his "nerve conduction studies of the lower extremities" were normal. (EX 5 at 26, 27)

Dr. William A. Crotwell, III, an orthopedic surgeon, examined Claimant on March 9, 1999 at the Respondents' request and the doctor reports as follows (RX 9):

"**HISTORY:** Ham Marine employed Mr. Roberts on 5/30/97 when he injured his lumbar and cervical spine lifting pipe overhead at 9 to 10 feet that weighed approximately 300 pounds. Dr. Bennett initially treated him on 6/02/97 with medication and x-rays that

showed arthritis. A MRI scan of the cervical and lumbar spine was obtained on 7/27/97 from Singing River Hospital. He was then referred to neurosurgeon, Dr. John McCloskey on 8/27/97, who obtained a myelogram Ct of the cervical and lumbar spine on 9/19/97 that was reported as normal. He was treated conservatively with anti-inflammatory, muscle relaxant and pain medication. He was off work and tried to return to work and then was terminated on 7/07/97. He was then referred to physiatrist, Dr. Molly Holtzman on 12/07/97 and was treated with physical therapy through 2/98 at which time he was released. He has not been treated since that time. He has been working for another company doing siding and related the work did not require any heavy lifting or twisting.

"**CURRENT COMPLAINTS:** The patient presented in my office with complaints of cervical spine pain, especially with bending forward. He had pain going out into the scapula area into the arms, down into the left elbow and occasionally the right side. He had full range of motion. Grip strength was good. No weakness. No major bowel or bladder dysfunction. He had 50% neck pain., 50% arm pain. He complained of lumbar spine pain just in the middle of the back. He had no radicular pain at all. Flexion was painful and coughing increased his pain. He had 100% back pain. He gave no previous history of any injury to the cervical or lumbar spine. According to the records, he was involved in a motor vehicle accident and gave a history of having played football prior.

"**PHYSICAL EXAMINATION:** On physical examination of the upper extremity reflexes were plus two and equal in the biceps and triceps, and brachioradialis. Sensory was normal. Sweat patterns were dry over both thumbs. Flexion and extension was 100%. Lateral motion was 100%. Both forearms measured 12 1/2". Biceps measured 11 1/2" each.

On physical examination of the lower extremity deep tendon reflexes were plus two and equal in the patella and achilles. Sensory was normal. Motor was 5/5. Toe and heel walk was good. Bilateral hip rotation was negative. Bilateral straight leg-raise in a sitting and lying position was to 90 degrees with no pain. The right calf measured 15 1/8" and the left calf measured 15". Both thighs measured 18". Flexion was to 100%, extension was 90%. He was able to flex and bend and remove his socks without any problems.

"**X-RAYS:** X-rays of the lumbar spine showed some mild to moderate degenerative arthritis, worse at L3-4. He also had a spondylolisthesis bilateral, but with no slippage. The cervical spine x-rays showed a reversed Lordosis and chronic degenerative disc disease with osteophyte formation at C5-7 and C6-7 with spur formation anteriorly and posteriorly. The oblique views show

moderate foraminal spurring at C5-6 and C6-7.

“**IMPRESSION: 1) CERVICAL STRAIN ON THE JOB IN 1997, 2) LUMBAR STRAIN ON THE JOB IN 1997, 3) CERVICAL DEGENERATIVE DISC DISEASE WITH FORAMINAL STENOSIS MILD TO MODERATE C5-6 & C6-7, 4) MILD LUMBAR DEGENERATIVE DISC DISEASE WITH SPONDYLOLISTHESIS, CONGENITAL.**

“**SUMMARY:** I think the patient has reached maximum medical improvement from his on the job injury. I do not think he sustained any permanent restrictions or permanent disability as a result of his injury.

Due to his cervical degenerative disc disease with spurring and lumbar degenerative disc disease with congenital problem of spondylolisthesis, I would recommend no heavy work activity and no lifting over 50 to 60 pounds. No major torquing positions, especially with the cervical spine. These restrictions are not related to his on the job injury.”

On the basis of the totality of this record and having observed the demeanor and heard the testimony of a credible Claimant, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **Id.** The presumption, though, is applicable once claimant establishes

that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984); **Kelaita**, **supra**. Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989); **Kier**, **supra**. Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981); **Holmes v. Universal Maritime Serv. Corp.**, 29 BRBS 18 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **Holmes**, **supra**; **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom.**

Gardner v. Director, OWCP, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents "specific and comprehensive" evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

Counsel for the Respondents contends that Claimant did not establish a **prima facie** case of causation and, in the alternative, that there is substantial evidence of record to rebut the Section 20(a), 33 U.S.C. §920(a), presumption. The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. §920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole." **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Respondent to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp.**, 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland**, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If Respondents submit substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may

place greater weight on the opinions of the Claimant's treating physicians as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his chronic lumbar and cervical disc syndrome, resulted from working conditions at the Employer's facility. The Respondents have introduced specific and comprehensive evidence severing the connection between such harm and Claimant's maritime employment. Thus, the presumption falls out of the case, does not control the result and I shall now weigh and evaluate all of the record evidence.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983);

Mijangos, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

The parties deposed Lee Davis on May 13, 1999 (RX 21) and Mr. Davis, who now is employed with Davis Welder Services, his own company, as a subcontractor for Noble Drilling, testified that he left Friede Goldman, an affiliate (?) of the Employer, on July 10, 1998, that the Claimant worked under his supervision, that Claimant "told me he had back problems but he did not say it happened on the job," that he "was having to go to a chiropractor or something about a problem he had, a previous problem he had been having with his back" and that Claimant "brought (him) an excuse from (a chiropractor) in Moss Point or Escatawpa or somewhere." According to Mr. Davis, if Claimant had told him that he had been injured on the job, he "would have went to safety" because "(a)ll injuries must be reported the day it happened before you leave the shipyard," Mr. Davis remarking, "Do not take any injury home with you no matter how severe or how minor." The Employer "require(s) a medical excuse" and requires that the worker call in anytime he/she is out sick and then to "bring an excuse (slip) when you come back." Paul Hennis was the supervisor or general foreman of Mr. Davis. According to Mr. Davis, Claimant and he had a problem with Claimant's workmanship and Claimant was terminated because of the "poor quality of (his) workmanship." Mr. Davis testified that Claimant "brought some excuses in and, as a notation that happens a lot of times on the job, people bring excuses and we just sometimes go call" the doctor to verify the disability slip. Mr. Davis called the chiropractor in Moss Point or Escatawpa on one occasion "and they said he wasn't in the day he had an excuse for." (RX 21 at 3-10)

According to Mr. Davis, Claimant "did have kin folk working out there" for the doctor and Mr. Davis made the telephone call the day before he terminated Claimant. Mr. Davis denied that Claimant ever told him that he had injured his back or neck in an injury on the job. Mr. Davis signed Claimant's termination and it was approved by a superintendent. Mr. Davis terminated Claimant on July 9, 1997 because of a poor fit on a bulkhead, **i.e.**, a failure to do the job assigned" and Claimant had already been terminated when Claimant presented his excuse slip to Paul Hennis, at which time Mr. Hennis also indicated to Claimant that he had been fired. Mr. Davis conceded that he "may have stated that he (Mr. Hennis) couldn't fire" Claimant because he (Mr. Davis) had terminated Claimant the day before solely "(f)or not doing a job he was assigned to do." Mr. Davis could not locate any of the doctor's

slips given him by the Claimant. (RX 21 at 10-14)

Mr. Davis testified that Claimant "said his back wouldn't let him keep doing the job he's been doing and wanted to swap into safety or something." Claimant sought a transfer to work as a forklift driver but Mr. Davis testified that Claimant's back problems would not tolerate the bouncing around that the driver gets from that job and that there was no alternate work for Claimant for which he was qualified. In any event, Claimant never told Mr. Davis that he had hurt his back in a shipyard accident. (RX 21 at 14-15)

Mr. Davis now does subcontracting work for Noble Drilling, the successor firm to Ham Marine and he agreed that the representatives of Friede Goldman could prevent him from doing that repair work. (RX 21 at 16-17)[2]

The parties deposed Paul Hennis (RX 22) and Mr. Hennis, who has been employed by Friede Goldman since 1990, testified that in May, June and July of 1997 he was a general foreman, that Claimant was a structural fitter and had duties "mainly (of) fit(ting) steel together to weld up" and that Lee Davis was Claimant's "direct supervisor." Mr. Hennis categorically denied that Claimant or Mr. Davis had advised him that Claimant had sustained a back or neck injury while working for the Employer, Mr. Hennis further testifying that it is the Employer's policy to require that all job injuries be immediately reported to the foreman and then to the safety department to determine if medical treatment to determine if medical treatment is required or what preventive steps should be taken. According to Mr. Hennis, "Mr. Davis is the one that actually fired him" because "Rock had made a bad fit or something and missed one day in between these days and I was going to fire him for the fit and Lee said, "NO, you ain't going to fire him, I've done fired him. So I mean that's the way it happened."

Mr. Hennis could not recall Claimant bringing to him any doctor's slips relating to a job injury or providing an excuse for an absence from work, and such slips are required by the Employer's policy, especially if the return to work is on light duty and/or with restrictions. Mr. Hennis also denied ever telling Claimant not to report a job injury, although I note that he did not answer his attorney's question as to whether he had ever called

---

[2]Objections made by Claimant's counsel at the depositions of Mr. Davis, Mr. Hennis and Mr. Romano are overruled as the testimony is relevant and material to the unresolved issues presented at the hearing and the objections really go to the weight to be accorded to those opinons. (JX 1; TR 10-13)

Claimant any names. (RX 22 at 8, lines 14-16) Claimant was terminated solely "because of a bad fit." (RX 22 at 3-8)

According to Mr. Hennis, he did not read Claimant's deposition but there was a meeting several weeks earlier, lasting thirty (30) minutes or so, where Mr. Davis and Mr. Hennis discussed with Respondents' attorney what had happened with Claimant, Mr. Hennis remarking that he "could hear what he (Mr. Davis) said" to counsel, that counsel gave them the gist of what Claimant stated in his deposition and that "he (counsel) was reading something." (RX 22 at 8-11)

The parties deposed R.C. "Rocky" Romano on May 13, 1999 (RX 20) and Mr. Romano, who now works for Friede Goldman, and who formerly worked for Ham Marine, knows Lee Davis and Paul Hennis but could not remember the name of Rock Roberts and could not "put a face to" the name. Mr. Romano was the Employer's Personnel Manager at the time and he could not recall whether or not Claimant ever brought anything in writing about the circumstances of his termination. He denied telling Claimant that Paul Hennis was "a butt-hole," Mr. Romano remarking, "Mr. Dennis ... is a very firm but fair foreman" and that workers who are doing their jobs do not have a problem with him "but if you don't do your job Paul Hennis will get rid of you fast. He don't play." While Mr. Romano did not remember Claimant, he did concede, "So if he says I talked to him, I'm sure I did ...," and that he probably told him that he would be considered to be rehired "because at that particular time it was like a revolving door over here" and the Employer was in need of skilled workers. Claimant would have been told that he would "need to come back and reapply" for work and Mr. Romano could not recall talking to Mr. Hennis or anyone else about rehiring Claimant. Moreover, Mr. Romano agreed that he had no direct recollection of ever having that discussion with the Claimant. (RX 20 at 4-10)

The parties deposed Ricky D. Parker on May 20, 1999 (RX 25) and Mr. Parker, who went to school with the Claimant and who has known him for "probably 20, 25 years," testified that he was the Safety Director for the Employer on May 30, 1997, that his duties put him "in charge of all safety and compliance on the yard; worker's comp.' environmental; legal" and that he investigated the alleged injury by the Claimant on May 30, 1997. Mr. Parker interviewed Paul Hennis "within a day or two after receiving notice of representation," sometime in 1997. All injuries must be immediately reported to the worker's foreman and then to the safety department for appropriate attention. Failure to follow company policy in that regard would be "subject for disciplinary action." Moreover, excuses to justify an absence from work are turned in to the foreman and then to the medical department. Falsification of

a medical slip is also grounds for termination and Mr. Parker has not been told that any of Claimant's medical excuses may have been falsified. (RX 25 at 4-7)

Claimant's personnel file reflects that he "was terminated because of a bad fit," **i.e.**, "(f)ailure to perform assigned duties," and not because of medical reasons. Claimant worked from May 30, 1997 through July 9, 1997 and, after that date, if Claimant had been released to return to work on restrictions, "we find a position ... within the restrictions." As Claimant was terminated because of that bad fit, Claimant "would have to come back, fill out an application and go through the interview process." Moreover, "as being a former employee, yes, he would have special consideration" to be rehired and, "most definitely," the Employer did have work within Claimant's restrictions, **i.e.**, "no lifting greater than 50 pounds occasionally, 30 pounds frequently; no prolonged overhead; no repetitive bending, stooping, so on." An injured employee returning to light duty on restrictions would be paid his regular pre-injury wages and "if there was some reason that he couldn't perform that work, then the supervisor would move him to a different area or a different job," such as an attendant in the tool room or in the guard shack or doing clerical work in one of the offices. Some of the employees have been on light duty for up to two years and there were employees on light duty as of the time of Mr. Parker's deposition. (RX 25 at 7-12)

According to Mr. Parker, Claimant's reputation for truth and honesty is "pretty good," but not "extremely good" and in the five years or so that he (Mr. Parker) worked for the Employer, he has "had a couple supervisors not be truthful with" him. (RX 25 at 12-15)

In view of the foregoing I find and conclude that Claimant did not sustain a work-related injury on May 30, 1997 as he alleges because I give greater weight to the evidence presented by the Respondents on this issue, and that evidence has been extensively summarized above.

Initially, I note that Claimant was hired by the Employer on February 14, 1997 (EX 15), that he acknowledged receipt on that date of the Employer's rules and regulations, including basic safety rules, safety violation policy, its absentee policy and its termination policy and procedure. (EX 15) Claimant was well aware of the Employer's requirement that all injuries, no matter how slight, must be reported to the immediate supervisor and then to the safety department. However, Claimant failed to follow that policy and even his friend of 20-25 years, Ricky Parker, failed to give his truthfulness a resounding ring of approval.

Claimant failed to follow those procedures and his failure to followup on the alleged notification given to the Employer requires that I find and conclude that he did not experience a work-related injury on May 30, 1997 as he alleges. As noted, I find the evidence presented on this issue by the Respondents to be more probative and persuasive, and this is the testimony of Messrs. Davis, Hennis, Romano and Parker. On the other hand, I find Claimant's testimony to be less than candid on what happened on May 30, 1997 and what he did and to whom he spoke between that date and July 9, 1997.

Moreover, I have rejected Claimant's medical evidence as based on subjective symptoms and incomplete history reports that he gave to his doctors.

However, in the event that reviewing authorities should hold, as a matter of law, that the Employer did not rebut the statutory presumption in Claimant's favor and that he has established a **prima facie** claim that he did experience a work-related injury on May 30, 1997, I shall now resolve the remaining issues.

Thus, as alternate findings, I would conclude that this closed record conclusively establishes that Claimant injured his lumbar and cervical areas as a result of his work duties on May 30, 1997, and I would so find and conclude. As alternate findings, I would find and conclude that the Respondents have not rebutted the statutory presumption in Claimant's favor by specific and comprehensive medical evidence. I also note that Dr. Crotwell, Respondents' medical expert, has opined that Claimant's symptoms were due to his work-related injury. (RX 9)

Timely Notice of Injury

Section 12(a) requires that notice of a traumatic injury or death for which compensation is payable must be given within thirty (30) days after the date of the injury or death, or within thirty (30) days after the employee or beneficiary is aware of a relationship between the injury or death and the employment. In the case of an occupational disease which does not immediately result in disability or death, appropriate notice shall be given within one (1) year after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship among the employment, the disease and the death or disability. Ordinarily, the date on which a claimant was told by a doctor that he had a work-related injury is the controlling date establishing awareness, and a claimant is required in the exercise of reasonable diligence to seek a professional diagnosis only when he has reason to believe that his condition would, or might, reduce his wage-earning capacity. **Osmundsen v. Todd Pacific Shipyard**, 755 F.2d 730, 732 and 733 (9th Cir. 1985); **see** 18 BRBS 112 (1986) (**Decision and Order on Remand**); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); **Cox v. Brady Hamilton Stevedore Company**, 18 BRBS 10 (1985); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Stark v. Lockheed Shipbuilding and Construction Co.**, 5 BRBS 186 (1976). The relevant inquiry is the date of awareness of the relationship among the injury, employment and disability. **Thorud v. Brady-Hamilton Stevedore Company**, 18 BRBS 232 (1986). **See also Bath Iron Works Corporation v. Galen**, 605 F.2d 583 (1st Cir. 1979); **Geisler v. Columbia Asbestos, Inc.**, 14 BRBS 794 (1981).

As the Employer did not receive written notice of the Claimant’s injury or occupational illness as required by Sections 12(a) and (b), by the Form LS-201, the claim is barred because the Employer had no knowledge of Claimant’s work-related problems and has offered probative and persuasive evidence to establish it was prejudiced by the lack of written notice, **i.e.**, failure to properly and timely investigate the alleged injury. **Sheek v. General Dynamics Corporation**, 18 BRBS 151 (1986) (**Decision and Order on Reconsideration**), **modifying** 18 BRBS 1 (1985); **Derocher v. Crescent Wharf & Warehouse**, 17 BRBS 249 (1985); **Dolowich v. West Side Iron Works**, 17 BRBS 197 (1985). **See also** Section 12(d)(3)(ii) of the Amended Act.

This closed record conclusively establishes that the Employer did not receive notice of the Claimant’s injury until some time after August 25, 1997. (RX 3) Thus, Claimant has failed to comply with the provisions of Section 12 of the Act.

Statute of Limitations

Section 13(a) provides that the right to compensation for disability or death resulting from a traumatic injury is barred unless the claim is filed within one (1) year after the injury or death or, if compensation has been paid without an award, within one (1) year of the last payment of compensation. The statute of limitations begins to run only when the employee becomes aware of the relationship between his employment and his disability. An employee becomes aware of this relationship if a doctor discusses it with him. **Aurelio v. Louisiana Stevedores**, 22 BRBS 418 (1989). The 1984 Amendments to the Act have changed the statute of limitations for a claimant with an occupational disease. Section 13(b)(2) now requires that such claimant file a claim within two years after claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have become aware, of the relationship among his employment, the disease, and the death or disability. **Osmundsen v. Todd Pacific Shipyards**, 755 F.2d 730 (9th Cir. 1985), and the Board's **Decision and Order on Remand** at 18 BRBS 112 (1986); **Manders v. Alabama Dry Dock & Shipbuilding**, 23 BRBS 19 (1989). Furthermore, pertinent regulations state that, for purposes of occupational diseases, the respective notice and filing periods do not begin to run until the employee is disabled or, in the case of a retired employee, until a permanent impairment exists. **Lombardi v. General Dynamics Corp.**, 22 BRBS 323, 326 (1989); **Curit v. Bath Iron Works Corp.**, 22 BRBS 100 (1988); **Lindsay v. Bethlehem Steel Corporation**, 18 BRBS 20 (1986); 20 C.F.R. §702.212(b) and §702.222(c).

The Benefits Review Board has discussed the pertinent elements of an occupational disease in **Gencarelle v. General Dynamics Corp.**, 22 BRBS 170 (1989), **aff'd**, 892 F.2d 173, 23 BRBS 13 (CRT) (2d Cir. 1989).

It is well-settled that the Employer has the burden of establishing that the claim was not timely filed. 33 U.S.C. §920(b); **Fortier v. General Dynamics Corporation**, 15 BRBS 4 (1982), **appeal dismissed sub nom. Insurance Company of North America v. Benefits Review Board**, 729 F.2d 1441 (2d Cir. 1983).

As alternate findings, I would conclude that the claim for compensation, dated August 25, 1997, Form LS-203, complies with the filing requirements of Section 13(a) for Claimant's traumatic injury. (CX 1)

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id.** at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once Claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternate employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternate employment is shown. **Wilson v. Dravo Corporation**, 22

BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

On the basis of the totality of this closed record, I find and conclude that Claimant could return to work as a structural fitter on and after July 9, 1997, that he was properly terminated for poor work and also that he could have been terminated for falsifying a medical excuse slip. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did submit probative and persuasive evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant no disability on and after July 10, 1997.

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support**

Department, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, and, again, only as alternate findings, I find and conclude that Claimant reached maximum medical improvement on February 11, 1998 and that he has no disability as the Employer established the availability of suitable alternate work as of July 10, 1997, within his restrictions, at the Employer's shipyard, per Mr. Parker. (RX 25)

With reference to Claimant's residual capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **decision and order on reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980). The proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra** at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

Respondents have offered the April 13, 1999 report and labor market survey of Leon Tingle, MS-LPC, Board-Certified Vocational Expert (RX 8) wherein Mr. Tingle opines that Claimant has the residual work capacity and transferrable skills to work as a gate tender, security guard hotel front desk clerk, cashier, forklift driver and shuttle driver and will be able to earn current wages of "5.50 to $10.00 based on direct placement into an entry level situation," Mr. Tingle concluding, "This would be of somewhat a loss of wage earnings for Mr. Roberts, as he was earning over $12.00 an hour at the time of his injury." (RX 8)

Mr. Tingle provided the following labor market survey as to Claimant's job opportunities (RX 8):

Results of Labor Market Survey/Job Search

Employers were contacted in the Mississippi Gulf Coast Area, and several suitable employment situations were identified. The main purpose of this activity was to identify employment opportunities and establish the Claimant's ability to earn wages. The jobs located paid between $5.50 and $10.00 an hour and appeared to be a representative indication of entry-level jobs in the area.

Boomtown Casino - 676 Bayview Avenue in Biloxi has openings for a Player's Club Host at $7.50 an hour and a Security Guard at $7.25 an hour. Both of these jobs are light in nature and require occasional bending or stooping and frequent reaching and handling. The duties consist of customer service in the Player's Club Job and providing for casino security and safety in the Security Guard Jog. The contact for Human Resources is Page Pearson.

Isle of Capri Casino/Crowne Plaza Resort - 151 Beach Boulevard in Biloxi is hiring Security Guards in the range of $7.00 to $7.50 an hour. This is light work requiring occasional stooping and bending and frequent reaching and handling. It should be noted that this person would be working/standing for most of the shift. The duties consist of providing for security and safety of patrons and employees in both the casino and the hotel part of the facility. The Employment Manager is Debbie Ramey.

Magnolia Security - 3102 Old Mobile Highway in Pascagoula is hiring Security Guards/Gate Tenders for $5.25 an hour. This is light work requiring frequent reaching and handling and occasional bending. These duties consist of guarding commercial or industrial sites. The Office Manager of this company is Gary Mitchell.

Pinkerton Security - 3712 Old Mobile Highway in Pascagoula is hiring Gate Guards/Security Guards in the range of $5.50 to $6.00 or more based on assignment and experience. This is light work with occasional stooping and bending and frequent reaching and handling. These jobs involve controlling entry into commercial and industrial sites. Current openings require no "key rounds". Other assignments do require occasional rounds on an hourly or bi-hourly. The Office Manager is Cindy Gibson.

Swetman Security - 180 Delauncy Street in Biloxi is hiring Gate Guards in the range of $5.50 to $8.00 an hour with assignments throughout the Mississippi Gulf Coast Area. These are light jobs with occasional to frequent reaching and handling. These jobs also involve controlling entry to commercial and industrial sites. The Manager is Phil Kelly.

Imperial Palace Casino Resort - 880 Bayview Avenue in Biloxi has

openings for Security Guards at $8.00 an hour and a Valet Parking Dispatcher at approximately $7.00 an hour. The Security Guard Job provides for casino security and safety and the Valet Parking Dispatcher maintains keys for patrons and issues the appropriate key to a Valet Parking Attendant when a receipt is presented to them. Both jobs are light in nature and require occasional stooping and frequent reaching and handling. The Employment Manager of this location is Dennis Wiley.

Grand Casino - 265 Beach Boulevard in Biloxi has an opening for a Hotel Desk Clerk at $7.50 an hour. This is a light job that requires occasional bending and stooping and frequent reaching and handling. This involves guest services at the casino's hotel. The Employment Coordinator is Beth Holland.

Lowe's Home Improvement Center - 3000 Highway 90 in Gautier has periodic openings for Cashiers in the range of $5.50 to $6.50 an hour based on experience. This is a light job in customer service and involves occasional bending and stooping and frequent reaching and handling. They also will occasionally hire a Security Gate Guard to control entry in and out of the lumberyard portion of the facility. This job will pay approximately $6.00 an hour and involves frequent reaching and handling. The main duty is insuring that the customers leave with the correct purchases in their vehicles. The Acting Personnel and Training Coordinator is Donna Murdaugh.

Treasure Bay Casino Resort - 1980 Beach Boulevard in Biloxi has an opening for a Transportation Dispatcher. This is a sedentary to light job in customer service. It requires occasional bending and stooping and frequent reaching and handling. The Employment Coordinator is Diane Young.

Advance Auto Parts - Main Street in Moss Point has been hiring Auto parts Clerk and trainees in the range of $6.00 to $10.00 an hour based on experience. These jobs are light to light medium in nature and require occasional bending or stooping and frequent reaching and handling. The job duties are customer service and sales. The Manager of this location is Steve Lindsay.

McRae's Department Store - 3800 US 90 in Gautier will occasionally hire a Loss Prevention Specialist (Security) in the range of $5.75 to $6.50 an hour based on experience. These jobs require occasional bending and stooping and frequent reaching and handling. The job duties involve security of the facility to ensure that there is no shoplifting or pilfarging (sic) by employees. The Store Manager is Dennis Hall.

Broadwater Present Resort - 2110 Beach Boulevard in Biloxi is hiring a Captain's Club (Player's Club) Representative in the range of $6.75 to $7.50 an hour. This is a light job that requires occasional bending and stooping and frequent reaching and handling. The job duties are customer service and providing for the needs of the customers. The Employment Coordinator is Cindy Williams.

Mr. Tingle provided the following **ADDENDUM** on April 19, 1999 (RX 8):

Since my initial interview with Mr. Roberts, I have had an opportunity to review the medical reports of Dr. William A. Crotwell, Orthopedic Surgeon, Dr. Mollie Holtzman, Physiatrist, and follow-up with the employer.

Dr. Crotwell stated that he believed that Mr. Roberts has reached MMI from his on the job injury. He did not think that he had sustained any permanent restrictions or permanent disability as a result of his injury. Because of his cervical degenerative disc disease with spurring and lumbar degenerative disc disease with congenital problem of spondylolisthesis, he did not recommend heavy work activity and no lifting over 50 - 60 pounds. Also, no major torquing positions, especially with the cervical spine. According to Dr. Crotwell, these restrictions are not related to his on the job injury.

After further review of additional medical reports, Dr. Mollie Holtzman, Physiatrist (Physical Medicine and Rehabilitation Physician), stated that Mr. Roberts reached MMI February 25, 1998. On a return to work form, Dr. Holtzman stated that Mr. Roberts should not lift over 50 pounds occasionally, 30 pounds frequently with no prolonged overhead work or repetitive bending and twisting.

Further, contacts have been made with his previous employer, Ham Marine, Ind./Friede Goldman Offshore, to discuss the possibility of him returning to work. Visits were made with Mr. Ricky Parker, Human Resources Director, and Mr. William Anderson who is the Safety and Medical Director. These individuals stated that positions were available and have been since his injury. Mr. Parker stated that periodic and current employment opportunities with Ham Marine, Inc./Friede Goldman Offshore are as follows:

1.	Tool Room Clerks	$10.00 - $13.00 per hour DOE
2.	Tool Room Foreman	$16.50 per hour DOE
3.	Pipewelding	$13.00 - $15.00 per hour
4.	Pipefitting	$13.00 - $15.00 per hour
5.	Structural Welder	$13.00 - $15.00 per hour
6.	Structural Fitter	$13.00 - $15.00 per hour
7.	1st & 2nd Class Electrician	$13.00 - $15.00 per hour

Ham Industry, Inc./Friede Goldman Offshore has a Light Duty Return to Work Program for their injured workers. It was explained to this counselor as meaningful work that needs to be performed because there is either a shortage of personnel to perform the job or not enough money in the budget to complete the job.

Mr. Anderson and Mr. Parker state that they make reasonable accommodations for these workers by allowing them to work in their craft considering their restrictions. An example would be allowing an individual to work on the platten where they would not have to climb or perform any heavy lifting. They would layout the material, fit and weld the material in that area.

Some individuals work in the tool room, medical department and general clean up. Placement of these individuals is based on the needs of the company. This company does have an active Light Duty Program and they were able to cite different employees that are currently participating in this program.

It is my opinion that the jobs outlined in my April 13, 1999 report and Labor Market Survey were available at the time of Mr. Roberts' injury and continue to be so today as the economy continues to flourish on the Mississippi Gulf Coast.

Hopefully, this addendum report will allow you the opportunity too understand what Mr. Roberts' wage earning capacity is at the present time. If you have additional information that I need to review that may have some impact on my opinion, please contact my office.

As indicated above, the Respondents have offered a Labor Market Survey (RX 8) in an attempt to show the availability of work for Claimant as a security guard and a hotel desk clerk and cashier. I do accept the results of that very thorough survey which consisted of the counsellor making a number of telephone calls to prospective employers to observe the working conditions and to ascertain whether that work is within the doctor's restrictions and whether Claimant can physically do that work.

It is well-settled that Respondents must show the availability

of actual, not theoretical, employment opportunities by identifying specific jobs available for Claimant in close proximity to the place of injury. **Royce v. Erich Construction Co.**, 17 BRBS 157 (1985). For the job opportunities to be realistic, the Respondents must establish their precise nature and terms, **Reich v. Tracor Marine, Inc.**, 16 BRBS 272 (1984), and the pay scales for the alternate jobs. **Moore v. Newport News Shipbuilding & Dry Dock Co.**, 7 BRBS 1024 (1978). While this Administrative Law Judge may rely on the testimony of a vocational counsellor that specific job openings exist to establish the existence of suitable jobs, **Southern v. Farmers Export Co.**, 17 BRBS 64 (1985), employer's counsel must identify specific available jobs; generalized labor market surveys are not enough. **Kimmel v. Sun Shipbuilding & Dry Dock Co.**, 14 BRBS 412 (1981).

The Labor Market Survey and the addendum (RX 8) can be relied upon by this Administrative Law Judge for the basic reason that there is complete information about the specific nature of the duties of the jobs identified by Mr. Tingle.

In the case **sub judice**, the parties are in agreement that Claimant is, in fact, employable and that he has been gainfully employed for the period of time summarized above, but the parties are in disagreement as to Claimant's post-injury wage-earning capacity and any disability being experienced by the Claimant.

In view of the foregoing, I do accept the results of the Labor Market Survey because I find and conclude that those jobs constitute, as a matter of fact or law, **suitable** alternate employment or **realistic** job opportunities. In this regard, **see Armand v. American Marine Corporation**, 21 BRBS 305, 311, 312 (1988); **Horton v. General Dynamics Corp.**, 20 BRBS 99 (1987). **Armand** and **Horton** are significant pronouncements by the Board on this important issue.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, and, again, only as alternate findings, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on or about August 25, 1997 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and

rev'd on other grounds sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents timely controverted Claimant's entitlement to benefits. (JX 1) **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

ENTITLEMENT

Since Claimant has not established a work-related injury, he is not entitled to benefits in this proceeding and his claim for benefits is hereby **DENIED**. Since any disability Claimant now experiences is due to non-work-related factors, he is not entitled to benefits in this proceeding and his claim for benefis is hereby **DENIED**.

The rule that all doubts must be resolved in Claimant's favor does not require that this Administrative Law Judge always find for Claimant when there is a dispute or conflict in the testimony. It merely means that, if doubt about the proper resolution of conflicts remains in the Administrative Law Judge's mind, these doubts should be resolved in Claimant's favor. **Hodgson v. Kaiser Steel Corporation**, 11 BRBS 421 (1979). Furthermore, the mere existence of conflicting evidence does not, **ipso facto**, entitle a

Claimant to a finding in his favor. **Lobin v. Early-Massman**, 11 BRBS 359 (1979).

While Claimant correctly asserts that all doubtful fact questions are to be resolved in favor of the injured employee, the mere presence of conflicting evidence does not require a conclusion that there are doubts which must be resolved in claimant's favor. **See Hislop v. Marine Terminals Corp**., 14 BRBS 927 (1982). Rather, before applying the "true doubt" rule, the Benefits Review Board has held that this Administrative Law Judge should attempt to evaluate the conflicting evidence. **See Betz v. Arthur Snowden Co**., 14 BRBS 805 (1981). Moreover, the U.S. Supreme Court has abolished the "true doubt" rule in **Maher Terminals, Inc. v. Director, OWCP**, 512 U.S. 267, 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994), **aff'g** 992 F.2d 1277, 27 BRBS 1 (CRT)(3d Cir. 1993).

As Claimant has not successfully prosecuted this claim, his attorney is not entitled to a fee award.

ORDER

It is therefore **ORDERED** that the claim for compensation benefits filed by Rock A. Roberts shall be, and the same hereby is **DENIED**.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated:
Boston, Massachusetts
DWD:ln